# Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors

HIGH COURT (IPOH) — CIVIL SUITS NO 22–264 OF 1999, NO 22–265 OF 1999, NO 22–266 OF 1999 AND NO 22–267 OF 1999
SU GEOK YIAM JC
16 FEBRUARY 2001

***Civil Procedure*** *— Striking out — Statement of claim — Unconditional appearance and defence filed, whether preclude application to strike out — Delay in filing application to strike out after filing of defence — No date fixed for trial — Whether delay fatal — Whether registrar relied on evidence in supporting affidavit in allowing application to strike out*

***Tort*** *— Defamation — Libel — Complaint letter copied to Central Bank alleged to be defamatory — Whether publication to third party — Privileged documents attached to letter, whether tort of defamation could be invoked — Burden on defendant to prove that defamatory reports were privileged*

The first plaintiff, a limited company, made a claim against its insurers, the fourth defendant, under some policies which included a fire insurance policy. The fourth defendant denied liability and refused to pay on the ground that the cause of fire was due to arson. It relied on a forensic report prepared by the second and third defendants. The first plaintiff was denied a copy of the report by the fourth defendant. So it lodged a complaint with Bank Negara against the fourth defendant. In response to a Bank negara's letter, the first defendant, as solicitors for the fourth defendant, issued a letter dated 6 April 1999 to the first plaintiff with copies to Bank Negara and several other parties. The plaintiffs alleged that the words used in the letter dated 6 April 1999 in their natural and ordinary meanings meant and by way of innuendoes were understood to mean that the plaintiffs were arsonists and had deliberately burnt the factory themselves in order to cheat the fourth defendant so as to claim the insurance money. This had not only injured the plaintiffs' reputation but also deprived the first plaintiff of its insurance claims. More than one year after entering its defence, the second defendant applied to strike out the plaintiffs' amended statement of claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC') on the ground that it did not disclose a reasonable cause of action; alternatively the claim by the second, third and fourth plaintiffs (the directors and manager of the first plaintiff) in this action against the second defendant be struck out as being frivolous and vexatious and an abuse of process of the court. The deputy registrar ruled in favour of the second defendant. The plaintiffs appealed. The plaintiffs submitted as follows: (i) the second defendant, having entered an unconditional appearance, was precluded or barred from applying under O 18 r 19(1) of the RHC to strike out the plaintiffs' statement of claim; (ii) no evidence was admissible yet the second defendant filed a supporting affidavit and the deputy registrar decided on a point of substantive law without a

A trial; (iii) the deputy registrar erred when he decided purely on the issue of publication of the report and did not deal with authorship of the report; and (iv) this was not a plain and obvious case for striking out.

B **Held**, allowing the appeal:

(1) The words 'at any stage of the proceedings' in O 18 r 19 of the RHC expressly exclude any time limit for the making of an application for striking out and these words should be given effect to. The mere fact that the second defendant had filed an unconditional appearance and a statement of defence does not C bar or preclude the second defendant from applying to strike out the plaintiffs' claim under O 18 r 19(1) of the RHC because the words 'at any stage of the proceedings' which qualify the words 'The court may … order to be struck out' in the rule itself presupposes the making of such an application unless the D ground relied upon is a lack of locus standi or jurisdiction (see pp 549H, 550C–D).

(2) A delay of more than one year after the filing of the statement of defence was not fatal to the second defendant's application made pursuant to O 18 r 19(1) because the trial date has not yet been fixed for the action (see p 550H–I).

E (3) From a perusal of the registrar's ground of decision, the court was satisfied that the registrar did not rely at all on the second defendant's supporting affidavit when he allowed the defendant's application to strike out the plaintiff's claim on the ground that it did not disclose a reasonable cause of action (see p 551B).

F (4) There was nothing in the second defendant's supporting affidavit to show that the second, third and fourth plaintiffs' claim against the second defendant was filed to annoy or embarrass the second defendant. Their claim could not be said to be obviously unsustainable. The second, third and fourth plaintiffs have a legitimate grievance and they have instituted the action in order to G obtain a remedy provided by law (see pp 552H–I, 553F, 555F).

(5) The deputy registrar erred when he decided solely on the absence of publication of the alleged defamatory letter on the part of the second defendant to the third persons concerned. He had failed to consider that there was publication by the second defendant of H the alleged defamatory report. It was clear that the contents of the alleged defamatory report which were wholly or partly authored by the second and third defendants were communicated to the fourth defendant who must have relied on the truth and accuracy of their contents when the fourth defendant denied liability under the insurance policy and repudiated the first plaintiff's insurance I claim and therefore there was sufficient publication to a third party which would entitle the plaintiffs to sue the second defendant for damages for libel (see pp 557E–F, 558B–C).

(6) The fact that in para 3 of the alleged defamatory letter the reports of the second and third defendants have been described by the first defendant as 'privileged documents' should not be construed to mean that the tort of defamation could not be invoked against the second defendant by the plaintiffs. The burden was on the second defendant to prove that the alleged defamatory reports were privileged documents (see p 558E–F).

[**Bahasa Malaysia summary**

Plaintif pertama, sebuah syarikat berhad, telah membuat tuntutan terhadap penanggung-penanggung insuransnya, defendan keempat, di bawah polisi-polisi tertentu yang mana termasuk polisi insurans kebakaran. Defendan keempat menafikan tanggungan dan enggan membayar atas alasan bahawa kebakaran tersebut telah disebabkan oleh perbuatan sengaja. Ia bergantung pada laporan forensik yang telah disediakan oleh defendan-defendan kedua dan ketiga. Plaintif pertama tidak diberikan sesalinan laporan tersebut oleh defendan keempat. Oleh itu ia telah membuat aduan dengan Bank Negara terhadap defendan keempat. Bagi menjawab surat Bank Negara, defendan pertama, sebagai peguamcara bagi defendan keempat, telah mengeluarkan surat bertarikh 6 April 1999 kepada plaintif pertama dengan salinan-salinan kepada Bank Negara dan beberapa pihak yang lain. Plaintif mendakwa perkataan-perkataan yang digunakan dalam surat bertarikh 6 April 1999 menurut maksudnya yang biasa dan asal bermakna dan secara sindiran difahamkan sebagai bermakna bahawa plaintif-plaintif adalah orang yang sengaja membakar dan telah sengaja membakar kilang mereka sendiri demi untuk menipu defendan keempat supaya dapat menuntut wang insurans. Ini bukan sahaja menjejaskan reputasi plaintif tetapi telah melucuthak plaintif untuk menuntut insuransnya. Lebih daripada satu tahun selepas memasukkan pembelaannya, defendan kedua telah memohon untuk membatalkan pernyataan tuntutan terpinda plaintif-plaintif selaras dengan A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas arahan bahawa ia tidak mendedahkan satu kausa tindakan yang wajar, secara alternatifnya, tuntutan oleh plaintif-plaintif kedua, ketiga dan keempat (pengarah-pengarah dan pengurus plaintif pertama) dalam tindakan ini terhadap defendan kedua dibatalkan kerana remeh dan menyusahkan serta suatu penyalahgunaan proses mahkamah. Timbalan pendaftar telah membuat keputusan yang memihak kepada defendan kedua. Plaintif-plaintif telah merayu. Plaintif berhujah seperti berikut: (i) defendan kedua setelah memasuki satu kehadiran tanpa bersyarat, telah dihalang atau terkecuali daripada memohon di bawah A 18 k 19(1) KMT untuk membatalkan pernyataan tuntutan plaintif-plaintif; (ii) tiada keterangan yang boleh diterima setakat ini namun defendan kedua telah memfailkan satu afidavit sokongan dan timbalan pendaftar telah membuat keputusan atas perkara undang-undang

substantif tanpa suatu perbicaraan; (iii) timbalan pendaftar telah tersalah pertimbangan apabila beliau membuat keputusan semata-mata atas isu penerbitan laporan tersebut dan tidak mengendahkan asal usul penulis laporan tersebut; dan (iv) ini bukannya suatu kes yang nyata dan mudah untuk pembatalan.

**Diputuskan**, membenarkan rayuan tersebut:

(1) Perkataan-perkataan 'dalam mana-mana peringkat prosiding' (at any stage of the proceedings) dalam A 18 k 19 KMT dengan nyatanya mengecualikan sebarang had masa untuk membuat sesuatu permohonan untuk pembatalan dan perkataan-perkataan ini haruslah dikuatkuasakan. Hakikat bahawa defendan kedua telah memfailkan suatu kehadiran tidak bersyarat dan pernyataan pembelaan tidak menghalang atau menghindari defendan kedua daripada memohon bagi mengetepikan tuntutan plaintif-plaintif di bawah A 18 k 19(1) KMT kerana perkataan-perkataan 'dalam mana-mana peringkat prosiding' (at any stage of the proceedings) yang melayakkan perkataan-perkataan 'Mahkamah boleh ... memberi perintah untuk dibatalkan' (The court may … order to be struck out) dalam kaedah tersebut sendiri menjangkakan terlebih dahulu pembuatan suatu permohonan yang sedemikian kecuali jika alasan yang diberi adalah ketiadaan locus standi atau bidangkuasa (lihat ms 549H, 550C–D).

(2) Kelewatan selama lebih dari satu tahun selepas pemfailan pernyataan pembelaan tidak memudaratkan permohonan defendan kedua yang dibuat selaras dengan A 18 k 19(1) KMT kerana tarikh perbicaraan masih belum ditetapkan untuk tindakan tersebut (lihat ms 550H–I).

(3) Daripada suatu penelitian akan alasan keputusan pendaftar, mahkamah berpuashati bahawa pendaftar tidak bergantung sama sekali kepada afidavit sokongan defendan kedua ketika beliau membenarkan permohonan defendan untuk membatalkan tuntutan plaintif atas alasan bahawa ia tidak mendedahkan suatu kausa tindakan yang wajar (lihat ms 551B).

(4) Tidak terdapat apa-apa di dalam afidavit sokongan defendan kedua yang menunjukkan bahawa tuntutan plaintif-plaintif kedua, ketiga dan keempat terhadap defendan kedua telah difailkan untuk memalukan atau menyakitkan hati defendan kedua. Tuntutan mereka tidak boleh diperkatakan sebagai pastinya tidak boleh dipertahankan. Plaintif-plaintif kedua, ketiga dan keempat mempunyai kilanan yang sah dan mereka telah memulakan tindakan tersebut demi untuk mendapatkan satu remedi yang diperuntukkan oleh undang-undang (lihat ms 552H–I, 553F, 555F).

(5) Timbalan pendaftar tersalah pertimbangan apabila beliau membuat keputusan semata-mata atas ketiadaan penerbitan surat

yang dikatakan fitnah tersebut oleh defendan kedua kepada pihak-pihak ketiga berkenaan. Beliau telah gagal untuk menimbangkan bahawa terdapatnya penerbitan oleh defendan kedua akan surat memfitnah yang dikatakan tersebut. Adalah jelas bahawa kandungan laporan yang dikatakan memfitnah itu yang mana keseluruhannya atau sebahagiannya telah ditulis oleh defendan-defendan kedua dan ketiga telah disampaikan kepada defendan keempat yang telah bergantung kepada ketepatan dan kebenaran kandungannya apabila defendan keempat menafikan tanggungan di bawah polisi insurans tersebut dan menyangkal tuntutan insurans plaintif pertama dan oleh itu telah terdapat penerbitan yang secukupnya kepada pihak ketiga yang mana akan memberi plaintif hak untuk mendakwa defendan kedua bagi mendapatkan gantirugi untuk libel (lihat ms 557E–F, 558B–C).

(6) Hakikat bahawa dalam perenggan 3 dari surat yang dikatakan memfitnah itu laporan-laporan oleh defendan-defendan kedua dan ketiga telah diterangkan oleh defendan pertama sebagai 'dokumen terlindung' tidak seharusnya bermakna bahawa tort memfitnah tidak boleh digunakan terhadap defendan kedua oleh plaintif-plaintif. Bebannya adalah terletak pada defendan kedua untuk membuktikan bahawa laporan-laporan memfitnah yang didakwa adalah dokumen-dokumen terlindung (lihat ms 558E–F).]

**Notes**

For cases on striking out statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5631–5641.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 263–352.

**Cases referred to**

*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (refd)

*Attorney General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 (refd)

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (refd)

*Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman and another action* [1987] 2 MLJ 633 (refd)

*Bhailal Jagadish v Additional Commissioner, Akola* AIR 1953 Nag 89 (refd)

*Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kian & Anor* [2000] 4 AMR 4853 (refd)

*DC Sangma v State of Assam* AIR 1978 SC 17 (refd)

*Hatchard v Mege* (1887) QBD 771 (refd)

*Hough v Windus* (1884) 12 QBD 224 (refd)

*Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd* [1993] 1 MLJ 408 (refd)
*Jamir Hassan v Kang Min* [1992] 2 MLJ 46 (refd)
*Jasa Keramat Sdn Bhd & Anor v Monotech (M) Sdn Bhd* [1999] 4 MLJ 637 (refd)
*Kaye v Robertson* [1991] FSR 62 (refd)
*Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 (refd)
*Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (refd)
*Low Yat v GC Grace* [1947] MLJ 115 (refd)
*N Caruppaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389 (refd)
*Orr Ewing, Re* 22 Ch D 456 (refd)
*Peck v Russell* [1899] 1 QB 86 (refd)
*Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 2 AMR 2553 (refd)
*Quebec Railway, Light, Heat & Power Co Ltd v Vandry* AIR 1920 PC 181 (refd)
*Queen, The v Bishop of Oxford* (1879) 4 QBD 245 (refd)
*S Manikam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90 (refd)
*Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ 251 (refd)
*Sheldon v Brown Bayley's Steel Works Ltd & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 (refd)
*SK Shana Ltd v State of Bihar* AIR 1953 Pat 161 (refd)
*Wenlock v Moloney & Ors* [1965] 2 All ER 871 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 18 r 19(1), O 33 r 2

*Ngan Siong Hing* (*Angie Neoh Hooi* with him) (*Abbas & Ngan*) for the plaintiffs.
*PH Looi* (*Zaid Ibrahim & Co*) for the defendants.

**Su Geok Yiam JC:.** This is an appeal against my decision allowing the plaintiffs' appeal (encl 82) against the decision of the learned deputy registrar in striking out the plaintiffs' claim against the second defendant, on the ground that the plaintiffs' statement of claim did not disclose a reasonable cause of action against the second defendant.

*Facts and background*

The first plaintiff is a limited company. It owns a factory which manufactures yarn and curtain tapes. The second and third plaintiffs are its directors. The fourth plaintiff was in charge of the management of the first plaintiff as its manager.

On 23 February 1998, a fire gutted the factory and destroyed and damaged the first plaintiff's plants, machinery, raw materials, stock in trade and other contents, thereby causing substantial loss and damage to the first plaintiff.

The plaintiffs did not know how the fire started. The plaintiffs lodged a police report vide Pusing Report No 186/98.

The police carried out an investigation into the fire. The Chemistry Department in its report vide No IP–408/98–0, on 31 March 1998 stated that it did not find any inflammable hydrocarbons. On 12 March 1999, the Kinta District Police stated in its report that the fire was caused by internal accident, suspected due to the fault of a small generator in the factory and that from the investigation conducted, there was no signs of criminal activity.

The first plaintiff made a claim against its insurers, the fourth defendant, a licensed insurance company, under some policies which included a fire insurance policy for the sum of RM3,665,458.

The fourth defendant denied liability and refused to pay on the ground that the cause of the fire was due to arson. It relied on a forensic report/reports allegedly prepared by the second and third defendants' agents and/or employees. The first plaintiff was denied a copy of the report/reports by the fourth defendant despite making several requests. So, it lodged a complaint with Bank Negara against the fourth defendant. In response to Bank Negara's letter dated 22 March 1999, the first defendant, as solicitors for the fourth defendant, replied to the first plaintiff as follows:

> Dear Sirs,
>
> Re: Damage caused by fire to factory at Bemban Industrial Park, Batu Gajah on 23 February 1998 belonging to Doree Industries (M) Sdn Bhd ('the Insured')
>
> 1 …
>
> 2 …
>
> 3 Notwithstanding the foregoing, *we write to confirm that the investigations which were undertaken by Thomas Howell Group (M) Sdn Bhd and Forensic Services (M) Sdn Bhd which were coordinated by us as solicitors for our clients, have now been completed and the reports made available to us as solicitors* as recently as 26 March 1999. *These reports are privileged documents which have been made available to us in our capacity as solicitors*. We are accordingly not obliged and will not make available to you copies of the same.
>
> 4 *Please be informed that the said loss adjusters and forensic experts have through the course of their investigations secured circumstantial as well as direct physical evidence which indicates and establishes that the fire which destroyed the factory was not fortuitous in origin and that the claim is therefore fraudulent*. Consequently, please be advised that we have been instructed to deny liability under the policy and to repudiate the claim.
>
> 5 We confirm that we have instructions to accept service of process on behalf of all insurers concerned. (Emphasis added.)

Yours faithfully,

cc 1 Pengarah,
Jabatan Pengawalan Insurans,
10th Floor, Block C,
Bank Negara Malaysia,
Jalan Dato Onn,
50000 Kuala Lumpur.
By Fax: 03-2912990/By Courier
Attn: Mr Lee Eng Huat
(Ref: 7318/19/1/1/3.99)

2 Messrs LA Gomes & Co,
Advocates & Solicitors,
No 10, Jalan Selamat,
Greentown (next to Ipoh Parade),
30450 Ipoh,
Perak Darul Ridzuan.
By Fax: 05-2542955/By Courier
(Ref: LG/MARK/CFB/IP/HP/40/98)

3 The Manager, Claims,
General Insurance Division,
Aetna Universal Insurance Sdn Bhd
Menara Aetna Universal,
84, Jalan Raja Chulan
50200 Kuala Lumpur.
By Fax: 03-2624939/By Courier
Att: Mr Simon Quah
(Ref: PKD 98 R 00005)

4 Claims Officer,
Non-Life Department,
Arab-Malaysian Assurance Berhad,
9th Floor, Bangunan AMDB,
No 1, Jalan Lumut,
50400 Kuala Lumpur.
By Fax: 03-4438680/By Courier
Attn: Cik Rohaiza bte Zakaria

5 Claims Manager,
MBf Insurans Berhad,
Level 41, Plaza MBf,
No 8, Jalan Yap Kwan Seng,
50450 Kuala Lumpur.
By Fax: 03-2632137/By Courier

6 Claims Manager,
Mayban Assurance Berhad,
27 Lorong Medan Tuanku Satu,
50300 Kuala Lumpur.
By Fax: 03-2914930/By Courier.

The four plaintiffs have alleged that the four defendants falsely and maliciously caused to be printed and published 'by extending a copy of the letter dated 6 April 1999 to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara containing false and malicious subjective assertions which

were arrived at by the four defendants, jointly and severally, upon reading the various reports prepared by the second and third defendants, and that by doing so they have caused detriment to the four plaintiffs.

There was also publication of the defamatory letter by way of carbon copying the letter to M/s LA Gomes & Co, a firm of advocates and solicitors practising in Ipoh which had no business to receive the same.

The words used in the letter dated 6 April 1999 in their natural and ordinary meanings meant, and by way of innuendoes were understood to mean, that the plaintiffs were arsonists and had deliberately burnt the factory themselves in order to cheat the four defendants and claim the insurance moneys.

This has not only injured the plaintiffs' reputation but also deprived the first plaintiff of its insurance claims.

All these facts and background are found in the plaintiffs' amended statement of claim filed on 11 September 1999 (encl 7). The court notes that the only difference between the plaintiffs' statement of claim filed on 10 August 1999 (encl 1) and their amended statement of claim is the addition of a new sub-para (xa), to para 26, to claim general damages from the four defendants.

In para 26 of their amended statement of claim, the four plaintiffs have claimed the following reliefs from the four defendants:

(i) *an injunction to restrain the first, second, third and fourth defendants from further publishing and circulating the forensic reports in regard to the fire which destroyed the plaintiff's factory on 23 February 1998*;

(ii) a declaration that the plaintiffs herein are entitled to all the forensic reports and findings now in the possession of the first to fourth defendants;

(iii) a declaration that the report or reports prepared by the second defendants are null and void;

(iv) a declaration that the third defendants are a decoy company which has no locus standi and any report prepared by them is null and void;

(v) special damages in the sum of RM3,665,458 being insurance due under the policies as tabulated in the statement of claim;

(vi) special damages in the sum of RM765,963 being 24% of the total amount of tabulated in annexure 1 of foreseeable pecuniary loss and additional claims;

(vii) loss of future earnings in the sum of RM1,700,308 being 24% of the amount tabulated in annexure 2;

(viii) against the first, second, third and fourth defendants and each of them under paras 11 and 12 *aggravated damages for libel and/or malicious falsehood* and subscribe to the global sum outlined in (10) below;

(ix) against the first, second, third and fourth defendants and each of them under para 15 *aggravated damages for libel and/or malicious falsehood* and subscribe to the global sum outlined in (10) below;

(x) *aggravated damages against the first, second, third and fourth defendant and each of them for libel and malicious falsehood* in the global sum of RM9m

only payable in the proportion of RM3m for the first plaintiff and RM2m each for the second, third and fourth plaintiffs respectively;

(xa) and/or in the alternative as against the first, second, third and fourth defendants and each of them *general damages* payable to the first, second, third and fourth plaintiffs, respectively;

(xi) interests;

(xii) costs; and

(xiii) such further relief as the court deems fit.

*Application to strike out*

On 1 December 2000, ie about one year two months after the second defendant had entered its defence, the second defendant applied vide its summons in chambers (encl 75) to strike out the plaintiffs' amended statement of claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC') on the ground that:

(a) it does not disclose a reasonable cause of action;

(b) alternatively, the claim by the second, third and fourth plaintiffs in this action against the second defendant be struck out as being frivolous and vexatious and an abuse of the process of the court.

*Amended statement of claim*

In order to determine whether the application of the second defendant has or is devoid of merits, the court has to examine the plaintiffs' amended statement of claim. In the plaintiffs' lengthy statement of claim, the plaintiffs have alleged, inter alia, as follows:

(5) The second defendants either by themselves or through their agents or associates or in association with persons unknown purportedly inspected the factory area and compound on known and unknown dates and took damaged samples, burnt out debris and items unknown, soil, sand and all sorts of items now in their custody without the knowledge and consent of the plaintiffs for so called inspection and verification, and thereafter *caused a biased report or reports to be produced in favour of the fourth defendants*.

(6) The first, second, third and fourth plaintiffs herein aver and categorically affirm that the fourth defendant connived and colluded with the first, second and third defendants to deceive and defraud the first plaintiff by producing inaccurate reports to defeat the first plaintiffs' claim and pecuniary interests.

(7) *The third defendant* is a private company purportedly incorporated in Malaysia with limited liability although it does not exist in the Registrar of Companies and a*re carrying on a type of business by styling themselves as forensic scientists and consultants who were engaged by the second defendant with the knowledge and complicity of the fourth defendant to analyze items and things taken in the first plaintiff's burnt down factory without the knowledge and consent of the plaintiffs for forensic tests and produced a report or reports that are false and untrue against the plaintiffs in order to defeat the plaintiffs' claims*.

(8) …

(9) The first, second, third and fourth plaintiffs aver that *the forensic report or reports used and relied on by the fourth defendant were prepared either individually and/or jointly by scientists or consultants working in the third defendant's and some person or persons in the second defendant's or by person or persons unknown, but are in the employment of the second, third and fourth defendants and the same were admittedly coordinated by the first defendant as solicitors for the fourth defendant*.

(10) *The first, second, third and fourth plaintiffs were not given any copy of the report or reports in spite of several requests*. As a result, the first plaintiff wrote to Bank Negara on 16 March 1999 to complain against the fourth defendant, and in response to a Bank Negara letter dated 22 March 1999, the first defendant, as solicitors for the fourth defendants, replied to the first plaintiff as follows:

(This letter has already been reproduced above)

(11) In the circumstances, *the first, second, third and fourth defendants falsely and maliciously caused to be printed and published by extending a copy of the letter dated 6 April 1999* addressed to the first plaintiffs' director to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara *containing those false and malicious subjective assertions which were arrived at by the defendants jointly and severally upon reading the various reports prepared by the second and third defendants* to the detriment of the first, second, third and fourth plaintiffs.

(12) In the same breath, the first, second, third and fourth plaintiffs aver that *the same letter referred to in para 11 was carbon copied to M/s LA Gomes & Co, a firm of advocates & solicitors practising in Ipoh which had no business to receive the same*.

(13) *The said words as used in the letter dated 6 April 1999 in their natural and ordinary meanings meant, and by way of innuendoes were understood to mean as follows*, that is to say:

(a) that the first plaintiff by themselves and through the dire acts of the second, third and fourth plaintiffs acted with criminal intent and burnt the factory themselves;

(b) that the first plaintiff by themselves and the second, third and fourth plaintiffs meant to cheat the fourth defendant on the insurance claims;

(c) that since the fire was not fortuitous, the only people who could have burnt it were the second, third and fourth plaintiffs by themselves or in collusion with others.

(14) *By reason of the publication of the said words the first, second, third and fourth plaintiffs have been injured in their reputations and are made to look like cheats, crooks and arsonists whereby their standing, honour and integrity have been brought into public scandal, odium and contempt*.

PARTICULARS OF INNUENDOES

The first, second, third and fourth plaintiffs hereby repeat para 13(a), (b) and (c) above.

(15) Further or in the alternative, the said words were false and were published maliciously.

PARTICULARS OF FALSITY

(i) That the first, second, third and fourth plaintiffs committed arson when the same is not true.

(ii) That the first, second, third and fourth plaintiffs are liable to be charged by the public prosecutor as suspected criminals;

(iii) That the cause of the fire was not fortuitous.

PARTICULARS OF MALICE

(i) The first, second, third and fourth plaintiffs repeat para 1 to 15 here.

(ii) The first plaintiffs purchased the various insurance policies from the fourth defendants as a sine quo non for loans given by the various finance companies to the first plaintiffs from insurance companies recommended or associated with them or approved by them.

(iii) The first, second, third and fourth plaintiffs aver that this has resulted in a conflict of interests.

(iv) The inordinate delay in the preparation of the so-called reports and the refusal of all the defendants to give any of the reports to the plaintiffs or their solicitors.

(v) The lack of transparency by refusing to disclose the names of the investigators and confirm the official status of the third defendant.

(16) The first plaintiff shall contend at the trial that *all the defendants* either by themselves and/or each of them acted without lawful authority from the first, second, third or fourth plaintiffs in entering the burnt down factory and thereby c*onniving with the fourth defendant to act in conflict of interest against the first plaintiff*.

(17) *The first plaintiff had on diverse dates purchased several Machinery Equipment All Risks Policies and/or also Consequential and Fire Insurance Policies from the said fourth defendant* where the benefits were assigned to numerous finance companies which provided the finance to the first plaintiff for the purchase of the machinery and equipment.

(18) …

(19) *The first, second, third and fourth plaintiffs aver that they had no knowledge as to how the fire started whereupon the plaintiffs lodged a police report* at the Pusing Police Station vide Report No 186/98 on 23 February 1998 and the plaintiffs herein verily repeat para 15.

(20) *The first, second, third and fourth plaintiffs aver that the police investigated into the fire and* collected twelve (12) envelopes of samples and debris from the burnt down factory and handed them to the *Jabatan Kimia Malaysia which vide its report No IP–408/98–0 issued on 31 March 1998 categorically stated that it did not find any inflammable hydrocarbons* on the contents in the envelopes marked 'E-1' to 'E-12' submitted by the police. The plaintiffs shall produce a copy of the report at the trial.

(21) The first, second, third and fourth plaintiffs further aver that *the Kinta District Police vide its report dated 12 March 1999 stated as follows*, that is:

> 'The fire was caused by internal accident (suspected due to the fault of a small generator in the factory.) From the investigation conducted, there were no signs of criminal activity.'

(22) The first, second, third and fourth plaintiffs further contend that *the reports submitted by the second and third defendants respectively were concocted*

*and that any finding made against the plaintiffs were premeditated and aimed at negating the plaintiffs' claim against the fourth defendant*.

(23) The first, second, third and fourth plaintiffs shall contend at the trial that the non-disclosure of the contents of the report to the plaintiffs is mala fide and highly unconscionable and injuriously oppressive to all the plaintiffs and is, to all intents and purposes, calculated to frustrate all the plaintiffs' claims notwithstanding that *the fourth defendants' total reliance on these secretive and opaque reports based on a subjective inference of fraud* was totally against the rules of natural justice and are, therefore, unconstitutional.

(24) The plaintiffs jointly aver that they have no knowledge as to who in the *second and third defendants carried out the false and malicious analyses of the items purportedly taken from the factory site or its environs*. As such, the plaintiffs jointly deny the reports of the so-called forensic experts as unauthentic and dishonest and that the materials analysed were not homogenous.

(25) *By reason of the matters aforesaid and the said words and inferences as used by the first defendant in their letter dated 6 April 1999 were therefore meant to deny the first plaintiffs of their claims against the fourth defendant and to cause permanent pecuniary damage and loss to the first plaintiff and irreparable damage to the reputation of the first, second, third and fourth plaintiffs by all the defendants*. (Emphasis added.)

*Registrar's decision*

On 28 November 2000 the learned deputy registrar ruled in favour of the second defendant. In this appeal the plaintiffs are dissatisfied with the following findings of the learned deputy registrar, at pp 6–8 of his judgment (encl 88):

> On the facts and gleaning from the pleadings of the statement of claim, *it is as 'plain as pikestaff' that the plaintiff claim for defamation is based on the letter of 6 April 1999*, which allegedly emanated from the law office of the first defendant to the plaintiff which apparently was extended to various other persons, apart from the plaintiff.
>
> However, *there is not an iota of evidence which I can gather from the pleadings which holds the second defendant responsible for the publication of the said letter to the various persons cited by the plaintiffs*.
>
> The role of the second defendant was merely to prepare a report based on its investigations at the scene of the fire. The averments in para 10 of the amended statement of claim only mentions the first defendant as being the person responsible for the said publication of the letter.
>
> The allegations of the plaintiff that the second defendant had 'connived and colluded' with the third and fourth defendant in the preparation of their allegedly damning report on the cause of the fire has no bearing on the present cause of action which is defamation brought about by the publication of the letter of 6 April 1999.
>
> One should not be carried away with the allegations of biasness levelled against the second defendant by the plaintiff and allow it to distract oneself from the *main cause of action here which is the publication of the letter dated 6 April 1999*. This I have borne in the forefront of my mind.

*I see nothing in the pleadings to hold the second defendant responsible directly or indirectly for the publication of the said letter of 6 April 1999.*

*For these reasons*, I cannot but accede to the defendant's application that *the plaintiffs' claim be struck out against the second defendant, as it is plain and obvious that there is no cause of action against the second defendant*. (Emphasis added.)

*The plaintiffs' case*

Before me, Mr Ngan Siong Hing, the learned counsel for the plaintiffs, has submitted as follows:

(1) the second defendant, having entered an unconditional appearance on 30 August 1999, was precluded or barred from applying under O 18 r 19(1) of the RHC to strike out the plaintiffs' statement of claim;

(2) no evidence is admissible yet the second defendant filed a supporting affidavit (encl 76) and the learned deputy registrar decided on a point of substantive law without a trial and without according to the plaintiffs a right to the cross-examination of the second defendant's witnesses;

(3) the learned deputy registrar erred when he decided purely on the issue of publication of the report and did not deal with authorship of the report;

(4) this is not a plain and obvious case for striking out because the plaintiffs' claim against the second defendant is not on the face of it obviously unsustainable. If it were so, it would not have taken the second defendant one year two months to apply for the striking out of the plaintiff's statement of claim after it had entered its defence. This delay has prejudiced the plaintiffs because the plaintiffs have incurred costs.

*The second defendant's case*

In response, Ms PH Looi, learned counsel for the second defendant, has submitted as follows:

(1) the filing of an unconditional appearance does not preclude or bar the second defendant from making an application under O 18 r 19(1) of the RHC to strike out the plaintiffs' statement of claim and there was no necessity for the second defendant to file a conditional appearance first before it can resort to the striking out procedure under O 18 r 19(1) of the RHC;

(2) delay is not fatal to an application for striking out under O 18 r 19(1) of the RHC as there is no time frame prescribed in that rule. Therefore, the second defendant can apply anytime; and

(3) the learned deputy registrar had relied solely on the statement of claim;

(4) it is clear from the statement of claim that the plaintiffs are claiming damages for defamation, ie libel, because of the publication of the letter by the first defendant to Bank Negara;

(5) the report which was prepared by the second defendant in the course of their work is a privileged document and there is no publication of the report to any unauthorized party other than to their client, the fourth defendant. So the plaintiff should only sue the fourth defendant since the fourth defendant is the insurer;

(6) this is a plain and obvious case for striking out under O 18 r 19(1) of the RHC because there is nothing in the pleadings which can indicate that the second defendant is responsible directly or indirectly for the publication of the said letter of 6 April 1999 (references were made to paras 1, 2, 3, 4 to 8, 9, 10, 11 and 13 of the statement of claim of which paras 5, 6, 7, 9, 10, 11 and 13 have been reproduced earlier on in this judgment);

(7) if the plaintiffs are saying that the second defendant took part in the wrongful repudiation of liability by the fourth defendant, the plaintiffs must plead the tort of conspiracy but in the statement of claim as it stands the tort of conspiracy is not pleaded;

After hearing submissions from both the learned counsels, I allowed the plaintiffs' appeal (encl 82) with costs in the cause.

I now state my reasons for arriving at that decision.

There are several issues which require the determination of this court. These issues are as follows:

(1) whether the second defendant is precluded or barred from applying under O 18 r 19(1) of the RHC to strike out the plaintiffs' statement of claim on the ground that it disclosed no reasonable cause of action since the second defendant has entered an unconditional appearance on 30 August 1999;

(2) whether delay is fatal to an application for striking out under O 18 r 19(1) of the RHC;

(3) whether the learned deputy registrar relied on the second defendant's supporting affidavit (encl 76) when he struck out the plaintiffs' claim against the second defendant on the ground that it disclosed no reasonable cause of action;

(4) whether the learned deputy registrar erred when he failed to consider the authorship of the reports and decided against the plaintiffs solely on the absence of publication of the report/reports by the second defendant to an unauthorized third party when he did not deal with the authorship of the report/reports;

(5) whether the plaintiffs' claim is solely for damages for defamation, ie libel, by virtue of the publication of the letter by the first defendant to Bank Negara and also to the Ipoh based legal firm of Messrs LA Gomes & Co;

(6) whether the plaintiffs have pleaded the tort of conspiracy in their statement of claim;

(7) whether this is a plain and obvious case for striking out under O 18 r 19(1) of the RHC.

*Effect of filing an unconditional appearance*

With respect to Mr Ngan, I am unable to agree with his submission that once an unconditional appearance is filed, an application under O 18 r 19(1)(a) of the RHC cannot be filed.

The two cases cited by him in support of his proposition can be distinguished from the facts of the present appeal before me because in both the cases, the challenge was mounted on a lack of locus standi or jurisdiction.

In the first case cited, *Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kian & Anor* [2000] 4 AMR 4853, his Lordship Abdul Malik Ishak J (at p 4889, para 25) considered himself bound by several cases, viz *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 (his own decision); *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; *Sheldon v Brown Bayley's Steel Works Ltd & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 (CA); *Re Orr Swing* 22 Ch D 456; and *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & 5 Ors* [1999] 2 AMR 2553 (his own decision again), when he said as follows:

> These authorities when read in its proper perspective would be detrimental to the first defendant in its appeal in encl 30, I have no choice but to dismiss encl 30 with costs.

Enclosure 30 was the first defendant's appeal against the decision of the learned senior assistant registrar in dismissing its application (encl 17) under O 18 r 19(1) of the RHC.

With respect I disagree. In my opinion the facts of the authorities relied upon by his Lordship Abdul Malik bin Ishak J revolve around the issue whether a defendant who has entered an unconditional appearance can invoke O 18 r 19(1) of the RHC in order to strike out a plaintiff's claim on the ground that the plaintiff has no locus standi to bring the proceedings in the first place.

In the second case cited, *Alor Janggus Soon Seng Trading Sdn Bhd*, the facts which are clearly distinguishable are briefly as follows:

> The appellants were the shareholders of the first respondent, a limited company. They had brought a claim against the first respondent and the Managing Director of the company, the second respondent, based on contract and tort alleging fraud on themselves as minority shareholders and alleging that a sale and purchase agreement for the sale of the company's shares was invalid on certain grounds. The agreement had been executed by the second respondent, on behalf of the company on the one part and one C on the other part, after the company had resolved at an extraordinary general meeting to sell the company's shares to one N and one C. Under the agreement, C was to pay the company a sum of RM1.95m and obtain the discharge of a charge

> over land belonging to the company by paying the redemption sum, in return for the shares of the company and also shares in two other companies belonging to the company.

The minority shareholders successfully obtained an ex parte injunction to restrain the respondents from implementing the agreement. However, this was short lived because the respondents successfully applied to set aside the injunction ex facie on the ground that the appellants had no locus standi to bring the minority shareholders' action against the company. On appeal, the Supreme Court held that the learned judge was wrong in dissolving the ex parte injunction. It further held that if the respondents were sure that the appellants had no locus standi or cause of action, the correct procedure to be adopted by the respondents was to either invoke O 18 r 19(1) or O 33 r 2 of the RHC. However, since the respondents had already filed their unconditional appearance, it was too late for them to do so.

It was in this context that his Lordship Jemuri Serjan CJ (Borneo) said as follows at p 254:

> Procedure
>
> The question that immediately comes to our minds is *if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980* ('the RHC') because if they succeed in their applications on any of these orders, the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O 18 r 19 or O 33 r 2 is the correct procedure by reference to authorities. The defendants relic heavily on the *Prudential Assurance* case to support their contention on the plaintiffs' lack of locus standi, and therefore, directed the main thrust of their arguments in that direction. Unfortunately, En John Khoo for the plaintiffs never at any time raised any objection to this unusual departure from the normal accepted procedure for reasons best known to himself as it seems obvious to us there are relevant questions to be raised in his favour. (Emphasis added.)

He continued as follows at p 258:

> It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. *It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19* but it is still open to them to have recourse to O 33 r 2 if they are so minded. (Emphasis added.)

In *Pet Far*'s case, his Lordship Abdul Malik bin Ishak J had referred to and followed his earlier decision in *Lim Seak Huat*'s case when he held that the defendant was precluded from applying under O 18 r 19(1) of the RHC to strike out the plaintiff's claim since the defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence. It is pertinent to point out here that one of the issues which had arisen for determination in *Pet Far*'s case was whether the Malaysian courts had jurisdiction to hear the matter as the gambling contract between the first and second defendants was carried out in international waters.

A For my part, I would prefer to follow the decision of his Lordship Zakaria Yatim J in the case of *Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman and another action* [1987] 2 MLJ 633 where at p 635, para A–B, his Lordship said as follows when dismissing one of the defendant's application to strike out the plaintiff's statement of claim under O 18 r 19(1) of the RHC on the ground that the case had already been set down for trial:

B

> This rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice* (1985) Vol 1, p 304.

C

This decision was followed in *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 by his Lordship Haidar J. In that case, the plaintiff had applied under O 18 r 19 of the RHC to strike out the plaintiff's statement of claim on the ground that it disclosed no reasonable cause of action or is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court. Mr TO Thomas had objected to the application on the ground of delay as the plaintiff had filed the application well after the defence and counter claim was filed.

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E In rejecting the preliminary objection based on the issue of delay as being without merit, his Lordship said as follows (at pp 50–51):

> While it may be true that in an O 14 application, it must normally be filed before the defence is delivered, however, in an O 18 application it would appear that there is no such constraint. Order 18 r 19 of the RHC specifically provides 'The court may *at any stage of the proceedings* order to be struck out or amended any pleading …' (Emphasis added.) The issue of delay in the O 18 application was considered by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and another action* where at p 635 the learned judge said:
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> F
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> > 'The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings, The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice* (1985) Vol 1, p 304.'
>
> G
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> I respectfully agree.

H

In my respectful opinion, the words 'at any stage of the proceedings' in O 18 r 19 of the RHC expressly exclude any time limit for the making of an application for striking out and these words should be given effect to. In *NS Bindra's Interpretation of Statutes* (8th Ed) at p 195, the author has dealt with this point under the sub-heading 'Legislature does not waste its words'. It is clear from what he has written that it is a rule of statutory interpretation that the Legislature does not waste its words or say anything in vain. (See *Quebec Railway, Light, Heat & Power Co Ltd v Vandry* AIR

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1920 PC 181 at p 186, per Lord Summer.) The presumption is always against superfluity in a statute. (See *The Queen v Bishop of Oxford* (1879) 4 QBD 245 at p 261 (per Cockburn CJ); *Hough v Windus* (1884) 12 QBD 224.)

Every part in a statute should be given as far as possible its full meaning and effect. (See *SK Shana Ltd v State of Bihar* AIR 1953 Pat 161.) No word is superfluous, redundant or surplus. (See *DC Sangma v State of Assam* AIR 1978 SC 17.) It is not permissible in interpreting a statute to omit words as redundant unless reading them in the statute would lead to absurdity. (See *Bhailal Jagadish v Additional Commissioner, Akola* AIR 1953 Nag 89).

I, therefore, hold that the mere fact that the second defendant has filed an unconditional appearance and a statement of defence does not bar or preclude the second defendant from applying to strike out the plaintiffs' claim under O 18 r 19 of the RHC because the words 'at any stage of the proceedings' which qualify the words 'The court may … order to be struck out' in the rule itself presupposes the making of such an application unless the ground relied upon is a lack of locus standi or jurisdiction.

In *N Caruppaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389, his Lordship Mohd Hishamuddin bin Mohd Yunus J had occasion to consider the same issue, ie whether the filing of an unconditional appearance and the serving of a statement of defence is a bar to the filing of an application under O 18 r 19 of the RHC, against the backdrop of *Alor Janggus*'s case, *Lorraine Esme Osman*'s case, *Jamir Hassan*'s case, *Lim Seak Huat*'s case and *Pet Far*'s case.

In a very well reasoned judgment, he has opted to follow the decisions of his Lordships Zakaria Yatim J in *Lorraine Esme Osman*'s case and Haidar J in *Jamir Hassan*'s case. I respectfully share his views.

He has said as follows (at p 4399, paras 25–35):

> … In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O 18 r 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O 18 r 19 expressly provides that such an application may be made at any stage of the proceeding. The words 'at any stage of the proceedings', to my mind, strongly imply that the right to make an application under O 18 r 19 is not conditional upon a filing of a conditional appearance. Such an application may be made, for example after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. …

*Effect of delay*

Following from what I have held in respect of the first issue, I am of the view that a delay of one year two months after the filing of the statement of defence is not fatal to the second defendant's application made pursuant to O 18 r 19 of the RHC because the trial date has not yet been fixed for the action. The explanation of Ms PH Looi that she only took over the case from the previous solicitors in June 2000 and in November 2000, she filed

A the application, cannot be taken cognizance of by the court since it was a statement from the bar and was not contained in any affidavit.

*Registrar's reliance on defendant's affidavit*

B I am satisfied from a perusal of the learned registrar's grounds of decision, in particular, the following excerpt of his judgment (encl 88) that he did not rely at all on the second defendant's supporting affidavit affirmed on 3 November 2000 and filed on 8 November 2000 (encl 76) when he allowed the defendant's application to strike out the plaintiff's claim on the ground that it did not disclose a reasonable cause of action (at p 4):

C

> In her submission in support of her application to strike out Ms Looi for the second defendant, took pains to run through the plaintiffs' *amended statement of claim* with the court in particular the events that culminated in the letter of 6 April 1999. This evinces itself in para 10 of the amended statement of claim wherein it is stated as follows:
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> > '*The first, second, third and fourth plaintiffs were not given any copy of the report or reports in spite of several requests. As a result, the first plaintiff wrote to Bank Negara on 16 March 1999 to complain against the fourth defendant and in response to a Bank Negara letter dated 22 March 1999, the first defendant as solicitor for the fourth defendant replied to the first plaintiff as follows, …*'
>
> E It was the contention of Ms Looi for the second defendant that nowhere in the statement of claim can it be said that the second defendant were responsible for publication of the letter of 6 April 1999. The offending letter was in fact, according to the averments written by the first defendant as solicitors for the fourth defendant, the insurance company. No doubt the letter of 6 April 1999, made mention of the investigations and report conducted by the second defendant but it emphasizes the fact that the said report of the second
>
> F defendant was privileged. (Emphasis added.)

*Plain and obvious case/frivolous and vexatious/abuse of the process of court*

G It has often been stressed and reiterated that the summary power of the court under O 18 r 19(1) of the RHC to strike out a plaintiff's statement of claim is a most drastic power which should be exercised only in plain and obvious cases, cases which are obviously unsustainable and cases where the process of the court has not been used bona fide (see *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ 251 at p 252 (per Haidar J); *Peck v Russell* [1899] 1 QB 86 at p 91; *Low Yat v GC Grace* [1947] MLJ 115; *Wenlock v Moloney & Ors* [1965] 2 All ER 871 at p 874; *Bandar* H *Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 at p 37 (per Mohamed Dzaiddin SCJ); *S Manikam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90.)

In *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, the Federal Court held that the mere fact that the plaintiff is I unlikely to succeed at the trial is no ground for striking out the cause of action. His Lordship Wan Suleiman FJ who delivered the decision of the Federal Court said as follows at p 109, paras E–H, right hand column:

It cannot be gainsaid that under O 18 r 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v Peat Marwick & Mitchell*. We need only refer to a passage from another authority referred to by learned counsel, the Privy Council decision in *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong*:

> 'It is a well established principle that the summary power under RSC O 18 r 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases … No evidence is admissible on a cause of action summons … the only documents that can be looked at are the writ, the documents referred to in the writ …'

The court notes that the learned deputy registrar has not dealt with the second part of the second defendant's application (encl 75), ie to strike out the second, third and fourth plaintiffs' claim against the second defendant on the grounds that the plaintiff's statement of claim is frivolous and vexatious and an abuse of the process of court under O 18 r 19(1)(b) and (c) of the RHC. This could be because he thought that it was unnecessary for him to do so since he had already struck out the plaintiff's statement of claim pursuant to O 18 r 19(1)(a) of the RHC. I shall now determine whether the second, third and fourth plaintiffs' amended statement of claim against the second defendant is frivolous or vexatious or an abuse of the court process.

The second and third plaintiffs are the directors of the first plaintiff and the fourth plaintiff was employed as its resident manager/accountant. Is their claim against the second defendant for damages for defamation frivolous and vexatious and an abuse of the process of court? In his supporting affidavit affirmed on 3 November 2000 and filed on 8 November 2000 (encl 7), Yap Kim Pin, a director of the second defendant has stated in para 19 that they have no locus at all to commence and maintain the action because of two reasons. First, they are not referred to at all in the letter. In order for the tort of defamation to be established, it is necessary that the words complained of as defamatory were published of and concerning the plaintiffs and each of them. Secondly, they cannot claim for the insurance moneys as a result of the fire because they were not the insured.

It is generally accepted that frivolous or vexatious actions mean cases which are obviously unsustainable. A frivolous or vexatious action is, therefore, one with no prospect of success and is often raised to embarrass or annoy the other party to the action. (See *Attorney General of Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274).

In my opinion, there is nothing in the second defendant's supporting affidavit (encl 76) to show that the second, third and fourth plaintiffs' claim against the second defendant was filed to annoy or embarrass the second defendant. It is settled law that the affairs of a limited company such as the first plaintiff are conducted by directors such as the second and third plaintiffs and its officers such as the fourth plaintiff. Managers are

in the same position as directors as regard liability in respect of any criminal proceedings. In cases of fraud or improper conduct, the court will pierce the corporate veil in order for it to do justice by treating a particular company as identical with the person or persons who control that company.

In this respect, the following excerpt at p 109, paras E–H, of *Peglin Development*'s case is relevant:

> We were referred to a number of cases, of which the most significant, in this respect, is *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1951] 1 QB 159.
>
> *A company*, he says, *may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does*. It also has hands which hold the tools and act in accordance with directions from the centre. *Some of the people in the company are mere servants and agents who are nothing more than hands to do the work* and cannot be said to represent the mind or will. O*ther are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company*. (Emphasis added.)

In this case, the fourth defendant has denied liability and repudiated the first plaintiff's claim under the insurance policy on the ground that the claim is a fraudulent one as the fire was deliberately set based on the report/reports prepared by the second and third defendants. The second and third plaintiffs have claimed that they have been defamed by the second defendant because if there was no such report/reports there would have been no allegation that the fire was an act of arson since the police investigations have already shown that there was no criminal activity which caused the fire. Their reputation is, therefore, at stake and they say they have suffered injury to their reputation.

In my view, their claim cannot be said to be obviously unsustainable. The fourth plaintiff's claim that his reputation has been injured by virtue of the fact that he was the resident manager of the factory at that time is a reasonable one since as manager, he is responsible for the day to day running of the factory and it cannot be said that his claim is without any prospect of success or intended to embarrass or annoy the second defendant.

It is clear from the decision of his Lordship Lim Beng Choon J in the case of *Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd* [1993] 1 MLJ 408 that it is not fatal to the cause of action for defamation if the name of the plaintiff is not mentioned.

At pp 419–420, para B onwards, he said as follows:

> It is stated by the author of *Gatley on Libel and Slander* (8th Ed) that to succeed in an action of defamation, the plaintiff must not only prove that the defendant published the words and that they are defamatory: he must also identify

himself as the person defamed. This proposition is elementary, bearing in mind that the law of defamation recognizes in every man a right to have the estimation in which he stands in the opinion of others untarnished by false statements to his discredit. It is, therefore, an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. What then is the test to which the plaintiff has to furnish an answer to satisfy the court that the words complained of are in fact published of him? Per Isaacs J in *David Syme v Canavan* at p 238, the test is defined in this way:

> 'The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? *That does not assume that those persons who read the words know, all the circumstances or all the relevant facts*. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and *whether the description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or believed to be a member of any other form, if in the circumstances description is such that a person hearing or reading the alleged would reasonably believe that the plaintiff was referred to, that is sufficient reference to him*.' (Emphasis added.)

Another case on this point is the case of *Le Fanu v Malcolmson*. In this case, a newspaper article imputed that 'in some of the Irish factories' cruelties were practised upon the employees and the plaintiffs, who were owners of a factory in Ireland, had proven to the satisfaction of the jury that the newspaper article was referring especially to their factory. In an appeal to the House of Lords to arrest judgment for the plaintiff, the appeal was dismissed. In giving judgment, Lord Campbell said at p 668:

> 'Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to the individual who complains that the slander applied to hire, in point of fact justified in making such complaint. This is clearly a reasonable principle, because whether a man is called by one name, or *whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who it is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated*.' (Emphasis added.)

The third case which is relevant is the case of *Lewis v Daily Telegraph Ltd* where Lord Reid at p 258 has this to say about the scope of the natural and ordinary meaning of the words complained of:

> 'There is no doubt that in actions for libel, the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So *he can and does read between the lines in the light of his general knowledge and experience of worldly affairs*. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge. That only arises indirectly in this case. There has been much argument about

innuendoes, true or false, and about proper methods of pleadings. My noble and learned friends intend to deal with those matters and I shall not add to their explanations. I shall only make some observations on the footing that, in this case, there is no question of innuendo in the true sense.

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words.' (Emphasis added.)

With regard to abuse of process, the following excerpt from the judgment of his Lordship Gopal Sri Ram JCA in the case of *Jasa Keramat Sdn Bhd & Anor v Monotech (M) Sdn Bhd* [1999] 4 MLJ 637 at p 645, paras E–H, is relevant:

> The law
> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v Lim Foo Chong* [1971] 2 MLJ 124; *Castanho v Brown & Root (UK) Ltd & Ano*r [1981] AC 557).

Applying the above principles of law to the facts of the present case, I am of the view for reasons already set out above that the second, third and fourth plaintiffs have a legitimate grievance and that they have instituted the action in order to obtain a remedy provided by law. It cannot be said that their intention is to oppress the second defendant or to apply pressure on the second defendant. In fact, the second defendant's supporting affidavit (encl 76) does not contain any of these allegations. Further, the fact that in their claim for damages for defamation the second, third and fourth plaintiffs are not entitled to claim the insurance moneys does not mean that their claim is frivolous and vexatious and an abuse of process because they have also claimed aggravated damages for libel and general damages as well.

*Publication to a third party*

It is apparent from a perusal of the plaintiffs' statement of claim that the plaintiffs' main cause of action is anchored on the tort of defamation, ie the tort of libel. What the plaintiffs are claiming for is the right that their reputation shall not be disparaged by the alleged written defamatory statements made about them to a third person or persons, ie the Pengarah,

Jabatan Pengawal Insurans, Bank Negara and to M/s LA Gomes & Co without lawful justification or excuse. The plaintiffs' action is intended to vindicate their reputation and for the defendants to make reparation for the injury done by the wrongful publication of the alleged libellous statements.

As mentioned earlier on in this judgment, the first plaintiff is a private limited company. It is trite law that a corporate body may maintain an action for libel or slander in the same way as an individual except that the imputation must reflect upon the company itself and not upon its members or officials only.

Under the sub-heading 'Who may be sued', the following passage in *Halsbury's Laws of England* (4th Ed, Reissue) Vol 28, *Libel and Slander*, at para 32, p 17, reads as follows:

> 32 *The publisher*
>
> As a general rule, the person to be sued as the defendant in an action of libel or slander, or to be prosecuted on an indictment for a libel, is he who has published the defamatory statement or caused it to be published.

The fact that the second defendant is relying on the defence of qualified privilege, ie that the alleged defamatory report/reports complained of were published to the fourth defendant on an occasion of qualified privilege, by itself, presupposes that the plaintiffs have a reasonable cause of action based on libel. The second defendant is contending that the occasion is privileged because the second defendant had a contractual duty to make known the alleged defamatory report/reports to the fourth defendant and the latter had a corresponding contractual duty to receive it. It is clearly stated in the alleged defamatory letter dated 6 April 1999 which was sent by the first defendant, acting on behalf of the fourth defendant, to the third persons concerned that the allegation of the first defendant that the first plaintiff's insurance claim is fraudulent was based on the alleged defamatory report/reports prepared by the second and third defendants who have been mentioned in the letter by their names, ie 'Thomas Howell Group (Malaysia) Sdn Bhd and Forensic Services (M) Sdn Bhd.' The burden is, therefore, on the second defendant to prove on the balance of probabilities that it is entitled to the defence of qualified privilege. Here, the second defendant is sued together with the first, third and fourth defendants on the basis that the second defendant is jointly and severally liable.

With regard to the question of joint and several liability, the following passage at p 19 of the same book is relevant and reads as follows:

> 38 *Joint and several liability*
>
> Every person who takes part in or procures the publication of a libel is prima facie jointly and severally liable for all the damage caused by it. Thus, if a libel appears in a newspaper, the author of the libel (see *Bond v Douglas* (1836) 7 C & P 626) and the proprietor, editor, printer,

> publisher and vendor of the newspaper are prima facie jointly and severally liable. … where the plaintiff sues persons jointly liable in one action and enters judgment against one defendant, he may continue the action against the other if the judgment against the first remains unsatisfied, but he cannot record against the second defendant more than the amount of the judgment entered against the first defendant.

Under the sub-heading 'Publication of Libel' in the same book the following passages are also relevant:

> At p 32
>
> 60 *Need for publication*
>
> No action for a libel will lie unless there has been a publication. In a civil action for libel, the plaintiff must allege and prove that the defendant published, or cause to be published, 'of and concerning the plaintiff', the words complained of to a third person, namely to some person other than the plaintiff.
>
> At p 33
>
> 62 *What amounts to publication*
>
> For the purposes of a civil action for libel, publication is the communication of defamatory matter to a third person … Publication [of a libel] consists in making known the defamatory statement … *Each communication of a libel is a separate publication in respect of which a civil action may be brought*. (Emphasis added.)

Applying the principles of law reproduced above to the facts of the present appeal the court, finds as follows:

(a) the learned deputy registrar erred when he decided solely on the absence of publication of the alleged defamatory letter dated 6 April 99 on the part of the second defendant to the third persons concerned. He had failed to consider that there was publication by the second defendant of the alleged defamatory report/reports and he had held that the only publication was by Messrs Sri Ram & Co, the fourth defendant's solicitors, when in fact it is clear from para 3 of the alleged defamatory letter set out in para 10 of the plaintiffs' statement of claim that the first defendant while acting as the solicitors for the fourth defendant, the plaintiffs' insurer, had coordinated the investigations which were undertaken by the second and third defendants and to whom (the first defendant) the alleged defamatory report/reports were made available by the second defendant as recently as 26 March 1999 and that, therefore, there was publication by the second defendant to the fourth defendant and from the fourth defendant to the firstt defendant and from the first defendant to the third persons concerned of the findings in the alleged defamatory report/reports;

(b) the learned deputy registrar also erred when he did not consider para 4 of the alleged defamatory letter which has categorically stated that 'the said loss adjusters (ie the second defendant) and forensic

experts (ie the third defendant) have through the course of their investigation secured circumstantial as well as direct physical evidence which indicate and establish that the fire which destroyed the factory 'was not fortuitous in origin and that the claim is thereafter fradulent';

(c) it is clear that the contents of para 4 show that the contents of the alleged defamatory report/reports which were wholly or partly authored by the second and third defendants were communicated to the fourth defendant who must have relied on the truth and accuracy of their contents when the fourth defendant denied liability under the insurance policy and repudiated the first plaintiff's insurance claim and, therefore, there is sufficient publication to a third party which would entitle the plaintiffs to sue the second defendant for damages for libel;

(d) based on the plaintiffs' statement of claim, in particular, paras 11, 12, 13, 14, 19, 20, 21, 22 and 24 (reproduced earlier on in this judgment), viewed against the backdrop of the law of defamation, the plaintiffs have a reasonable cause of action against the second defendant and, therefore, the learned deputy registrar was wrong when he allowed the plaintiffs' statement of claim to be struck out under O 18 r 19(1)(a) of the RHC;

(e) the fact that in para 3 of the alleged defamatory letter the reports of the second defendant, Thomas Howell Group (M) Sdn Bhd and the third defendant, Forensic Services (M) Sdn Bhd have been described by the first defendant as 'privileged documents' should not be construed to mean that the tort of defamation cannot be invoked against the second defendant by the plaintiffs. The reason is simple. The burden is on the second defendant to prove that the alleged defamatory reports are privileged documents. In my view, there is a very important difference in law between privileged documents and documents made on a privileged occasion. In the case of the former, if successfully invoked, they need not be produced in court as evidence. In the case of the latter, if successfully invoked, they constitute the defence of qualified privilege.

(f) Even if the second defendant can successfully prove the defence of qualified privilege, the matter does not end there because the burden then shifts back to the plaintiff to prove malice. Here, in paras 11, 15 and 24 of the plaintiffs' statement of claim (reproduced earlier on in this judgment), the plaintiffs have alleged malice on the part of the second defendant;

*Tort of malicious falsehood/tort of conspiracy to injure*

Quite apart from the cause of action based on the tort of defamation, the plaintiffs are also relying on two other causes of action based on the torts of malicious falsehood and conspiracy to injure.

A In *Kaye v Robertson* [1991] FSR 62 at p 67, Glidewell LJ described the essentials of the tort of malicious falsehood as follows:

> [T]he essentials of this tort are that the defendant has published about the plaintiff words which are false, that they were published maliciously and that special damage has followed as the direct and natural result of their publication.

B In *Clerk & Lindsell on Torts* (18th Ed, 2000) the following passage (at p 1244) concerning a comparison between the two torts is relevant:

> 23–30 *Malicious falsehood and defamation compared*
> Although malicious falsehood and defamation have different origins, there are obvious similarities between the two actions and the same facts may constitute both torts … However, there are clear and substantial differences between the torts, the most basic of which is that defamation protects the claimant's reputation, while malicious falsehood protects the claimant's interest in his property or trade (or economic interests more generally).

C

D Another very important difference is that an action for malicious prosecution survives the death of the claimant unlike an action for defamation. (See *Hatchard v Mege* (1887) QBD 771.)

Paragraph 5 of the plaintiffs' statement of claim alleges that the second defendant has caused biased report or reports to be produced in favour of the fourth defendants. Paragraph 11 specifically alleges that E 'the first, second, third and fourth defendants falsely and maliciously caused to be printed and published by extending a copy of the letter dated 6 April 1999 addressed to the first plaintiffs' director to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara containing those false and malicious subjective assertions which were arrived at by the defendants F jointly and severally upon reading the various reports prepared by the second and third defendants to the detriment of the first, second, third and fourth plaintiffs.' Paragraph 12 alleges publication to a non interested third party.

Paragraph 15 also alleges that the said words were false and were G published maliciously. Paragraphs 26(viii), (ix) and (x) expressly set out the plaintiffs' claim against all the four defendants for aggravated damages for libel and/or malicious falsehood. The first plaintiff is also claiming against all the defendants for special damages arising from the wrongful repudiation by the fourth defendant of its claim for the insurance moneys. The court is of the view that these paragraphs contain the averments necessary to invoke H the tort of malicious falsehood over and above the tort of defamation against all four defendants.

With regard to the third cause of action which is based on the tort of conspiracy to injure, the court is of the view that the relevant averments are contained in paras 6, 7, 9, 10, 16, 23 and 25 of the plaintiffs' statement of I claim.

For reasons set out above, the court is of the view that at this stage of the proceedings all three causes of action are reasonable and that the

plaintiffs' claim against the second defendant should be allowed to go for trial. A

In the premises, I allowed the plaintiffs' appeal (encl 82) with costs and set aside the order of the learned deputy registrar dated 28 November 2000.

*Plaintiff's appeal allowed.* B

Reported by Jafisah Jaafar

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